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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIAUNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

In re:

DEBORAH LOUISE STARZER,

Debtor(s).

Case No. 04-34413-B-7

Chapter 7.

LINDA SELINE SWIHART,

Plaintiff(s),

Adv. No. 05-2110-B

vs.

Date:

Time:

Place:

DEBORAH LOUISE STARZER,

Defendant(s).

## MEMORANDUM DECISION

This adversary proceeding was submitted on a Stipulation of Facts filed June 28, 2005 (Docket 13). The facts stated in the Stipulation of Facts are adopted as the findings of the court. In a nutshell, in July, 2001, Defendant petitioned the Butte County Superior Court for appointment as the conservator of the person and estate of Plaintiff, Defendant's mother. On September 26, 2001, Defendant was appointed conservator of the person and estate of Plaintiff pursuant to the California Guardianship-Conservatorship Law, Cal. Probate Code § 1400, et seq. (the

1 "CGCL"). One of the assets of the conservatorship estate was a  
2 margin securities account known as the "E-Trade Account."

3 After Defendant's appointment as conservator, she took no  
4 action with regard to the E-Trade Account. During the  
5 conservatorship, the value of the E-Trade Account declined as a  
6 result of sales of securities in the account to satisfy "margin  
7 calls."

8 In November, 2002, Defendant filed her first account and  
9 report of conservator. Plaintiff objected to the first account,  
10 requesting, inter alia, that Defendant be surcharged for the loss  
11 of value of the E-Trade Account. After trial, the Butte County  
12 Superior Court found that Defendant ignored the E-Trade Account  
13 and managed only other parts of the conservatorship estate. The  
14 Superior Court further found that Defendant "did not act with  
15 ordinary care and diligence as is required by law, nor did she  
16 act prudently to conserve or protect the E-trade account from  
17 losses."

18 Pursuant to the Superior Court's ruling, on March 5, 2004, a  
19 judgment after trial (the "Judgment") was filed surcharging  
20 Defendant in the amount of \$82,143.20, plus costs of suit.  
21 Plaintiff's costs of suit in the surcharge action were \$9,555.10.

22 After the Stipulation of Facts was filed, the parties  
23 submitted briefs, and the matter was deemed submitted on August  
24 29, 2005, the last date for filing Plaintiff's reply brief.

25 For the reasons stated in this memorandum decision,  
26 Defendant's debt to Plaintiff pursuant to the Judgment (in the  
27 amount of \$82,143.20, plus costs of \$9,555.10, for a total of

1 \$91,698.30), is non-dischargeable in this chapter 7 case pursuant  
2 to 11 U.S.C. § 523(a)(4). In addition, Plaintiff shall recover  
3 costs in this adversary proceeding in the amount of \$150.00, and  
4 that amount is also non-dischargeable in this chapter 7 case  
5 pursuant to 11 U.S.C. § 523(a)(4).

6 As the parties recognize, this case turns on the resolution  
7 two issues: (1) whether Defendant's status as conservator of the  
8 person and estate of Plaintiff created a fiduciary relationship  
9 within the meaning of 11 U.S.C. § 523(a)(4), and (2) if so,  
10 whether Defendant's conduct in "ignoring the E-trade account and  
11 managing only other parts of the Conservatorship estate," thereby  
12 creating damage to Plaintiff in the amount set forth in the  
13 Judgment, constituted defalcation while acting in a fiduciary  
14 capacity within the meaning of 11 U.S.C. § 523(a)(4).

#### 15 16 **Fiduciary Relationship**

17 Whether a particular relationship involves a fiduciary  
18 capacity under 11 U.S.C. § 523(a)(4) is a question of federal  
19 law. Blyler, et al. v. Hemmeter (In re Hemmeter), 242 F.3d 1186,  
20 1189 (9<sup>th</sup> Cir. 2001); Woodworking Ent., Inc. v. Baird (In re  
21 Baird), 114 B.R. 198, 202 (9<sup>th</sup> Cir. BAP 1990). The term  
22 "fiduciary" in the bankruptcy discharge context includes  
23 technical and express trusts, but excludes trusts ex maleficio,  
24 i.e., trusts that arise by operation of law upon a wrongful act.  
25 In re Cantrell, 329 F.3d 1119 (9<sup>th</sup> Cir. 2003), citing Lewis v.  
26 Scott (In re Lewis), 97 F.3d 1182, 1185 (9<sup>th</sup> Cir. 1996).

27 A fiduciary relationship imposed by statute may cause a  
28

1 person to be considered a fiduciary under 11 U.S.C. § 523(a)(4):

2 In general, a statutory fiduciary is considered a  
3 fiduciary for the purposes of § 523(a)(4) if the  
4 statute: (1) defines the trust res; (2) identifies  
5 the fiduciary's fund management duties; and (3)  
6 imposes obligations on the fiduciary prior to the  
7 alleged wrongdoing.

8 Hemmeter, 242 F.3d at 1190.

9 The CGCL meets the foregoing requirements. First, the CGCL  
10 defines the trust res. The analysis on this point begins with  
11 Cal. Probate Code § 2100 which states:

12 Guardianships and conservatorships are governed by  
13 Division 3 (commencing with Section 1000) except to the  
14 extent otherwise expressly provided by statute, and by  
15 this division. If no specific provision of this  
16 division is applicable, the provisions applicable to  
17 administration of estates of decedents govern so far as  
18 they are applicable to like situations.

19 Cal. Prob. Code § 2100 (West 2002 & Supp 2005).

20 There is no specific statute in Division 3 that expressly  
21 addresses the res of a conservatorship estate<sup>1</sup>. There are  
22 specific statutes which state what is NOT part of a  
23 conservatorship estate. Those statutes will be addressed further  
24 below.

25 Because no statute in Division 3 specifically defines the  
26 res of a conservatorship estate, Probate Code § 2100 directs  
27 attention to the provisions governing administration of  
28

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29 <sup>1</sup> Under Cal. Probate Code § 1801(b), a conservator of the  
30 estate may be appointed for a person who is substantially unable  
31 to manage his or her own financial resources. That section  
32 furthers the legislative purpose stated in Cal. Probate Code §  
33 1800(g) to provide for the proper management and protection of  
34 the conservatee's real and personal property. However, neither  
35 of these sections expressly defines the res of a conservatorship  
36 estate.

1 decedents' estates. Those provisions are located in Division 7  
2 beginning at Probate Code Section 7000. Probate Code Section  
3 7001 states:

4       The decedent's property is subject to administration  
5       under this code, except as otherwise provided by law,  
6       and is subject to the rights of beneficiaries,  
7       creditors, and other persons as provided by law.

8 Cal. Prob. Code § 7001 (West 1991 & Supp 2005). "Property" is  
9 defined in Probate Code Section 62 to mean "anything that may be  
10 the subject of ownership and includes both real and personal  
11 property and any interest therein." Cal. Prob. Code § 62 (West  
12 2002 & Supp 2005). That definition of property is generally  
13 applicable under the Probate code. Cal. Prob. Code § 20 (West  
14 2002 & Supp 2005).

15       Applying Probate Code Section 7001 to the present case  
16 produces a starting point that all of the conservatee's property,  
17 both real and personal, tangible and intangible, is part of the  
18 conservatorship estate. As noted above, there are specific  
19 provisions in Division 3 regarding what is NOT part of the  
20 estate. See e.g. Cal. Prob. Code § 1828.5 (limited  
21 conservatorships) and Cal. Prob. Code § 2601 (wages or salaries  
22 for employment are not part of the estate). Section 2100  
23 provides that these specific excluding provisions serve as  
24 limitations on the general rule. The details of the specific  
25 sections are not relevant to this case, because none of them  
26 applies. They merely reinforce the conclusion that the Probate  
27 Code includes a comprehensive statutory scheme defining the res  
28 of the conservatorship estate. That statutory scheme is

1 sufficient to satisfy the first prong of the Hemmeter test.

2 Second, the Probate Code identifies the fiduciary's fund  
3 management duties. Probate Code Section 2101 states: "The  
4 relationship of...conservator and conservatee is a fiduciary  
5 relationship that is governed by the law of trusts, except as  
6 provided in this division." Probate Code Section 2401(a) states,  
7 in relevant part:

8 The...conservator...has the management and control of  
9 the estate and, in managing and controlling the estate,  
10 shall use ordinary care and diligence. What  
11 constitutes use of ordinary care and diligence is  
12 determined by all the circumstances of the particular  
13 estate."

14 Cal. Prob. Code §§ 2101 and 2401(a) (West 1991 & Supp 2005).

15 The foregoing provisions of the CGCL identify the  
16 fiduciary's fund management duties. Those provisions satisfy the  
17 second prong of the Hemmeter test.

18 The provisions of the CGCL were invoked by Defendant's  
19 appointment as conservator on September 26, 2001, prior to any  
20 wrongdoing that resulted in the Judgment. Accordingly, the third  
21 prong of the Hemmeter test is satisfied.

22 Based on the foregoing, the court concludes that Defendant  
23 acted at all relevant times in a fiduciary capacity within the  
24 meaning of 11 U.S.C. § 523(a)(4).

#### 25 Defalcation

26 Defalcation within the meaning of 11 U.S.C. § 523(a)(4) is  
27 broadly defined:

28 A defalcation is a failure of a party to account for  
money or property that has been entrusted to them.

1 E.g., In re Cowley, 35 B.R. 526, 529 (Bankr. D. Kan.  
2 1983). In the context of section 523(a)(4), the term  
3 "defalcation" includes innocent, as well as intentional  
or negligent defaults so as to reach the conduct of all  
fiduciaries who were short in their accounts.

4 Baird, 114 B.R. at 204.

5 The Judgment establishes that Defendant breached her  
6 fiduciary duties and was surcharged as a result. The surcharge  
7 compensates Plaintiff for a shortage in Defendant's account as  
8 conservator. Therefore, the court concludes that Defendant's  
9 conduct that resulted in the Judgment constituted a defalcation  
10 while acting in a fiduciary capacity within the meaning of 11  
11 U.S.C. § 523(a)(4).

12 The court notes parenthetically that Blyler, et al. v.  
13 Hemmeter (In re Hemmeter), 242 F.3d 1186, 1189 (9<sup>th</sup> Cir. 2001) is  
14 distinguishable on this point. Hemmeter involved a suit against  
15 the fiduciaries of an Employee Stock Ownership Plan and a 401K  
16 Plan established by Morrison Knudsen Corporation. The plaintiffs  
17 contended that the fiduciaries were liable for the decline in  
18 value of the Morrison Knudsen stock held by the plans. The Ninth  
19 Circuit Court of Appeals upheld the dismissal of the complaint  
20 for failure to state a claim upon which relief could be granted.  
21 It held that the plaintiffs had failed to state a claim because  
22 the plans in question<sup>2</sup> specifically authorized investment in  
23 Morrison Knudsen stock, and therefore simply investing in and  
24 holding that stock could not constitute a "defalcation" within

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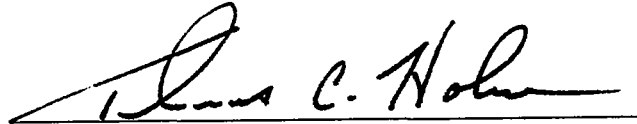
25  
26 <sup>2</sup> In the case of the ESOP, the court also noted that ERISA  
27 recognizes that such plans are designed to invest primarily in  
qualifying employer securities. Hemmeter, 242 F.3d at 1191, n.2.

1 the meaning of 11 U.S.C. § 523(a)(4). Hemmeter, 242 F.3d at  
2 1191. Here, Defendant enjoys no similar specific authorization  
3 to invest in or hold the contents of the E-Trade Account.

4  
5 **Conclusion**

6 Because Defendant acted at all relevant times in a fiduciary  
7 capacity within the meaning of 11 U.S.C. § 523(a)(4) and because  
8 Defendant's conduct that resulted in the Judgment constituted a  
9 defalcation while acting in a fiduciary capacity within the  
10 meaning of 11 U.S.C. § 523(a)(4), Plaintiff is entitled to  
11 judgment as set forth above. The court will issue a separate  
12 judgment that complies with Bankruptcy Rule 9021.

13 Dated: SEP - 6 2005

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15 Thomas C. Holman  
16 United States Bankruptcy Judge  
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CERTIFICATE OF MAILING

I, , in the performance of my duties as Deputy Clerk to the Honorable Thomas C. Holman, mailed by ordinary mail a true copy of the attached document to each of the parties listed below:


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DATE: 9/7/05

  
Deputy Clerk

BARBARA REYNOLDS